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D.1 Introduction

Three example agreements are provided below, a sample agreement among trustees (referred to as the Memorandum of Understanding or MOU) and two draft templates (a general framework and an incident-specific agreement) among trustees and RPs (referred to as the Memorandum of Agreement or MOA). Trustees may use these agreements as templates for other incidents.

D.2 Sample Agreement among Trustees

I. INTRODUCTION

**MEMORANDUM OF AGREEMENT
AMONG THE
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION,
TEXAS PARKS AND WILDLIFE DEPARTMENT,
TEXAS GENERAL LAND OFFICE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
AND
UNITED STATES DEPARTMENT OF THE INTERIOR**

This Memorandum of Agreement (MOA) executed by the Texas Natural Resource Conservation Commission (TNRCC), Texas Parks and Wildlife Department (TPWD), Texas General Land Office (TGLO), the National Oceanic and Atmospheric Administration of the United States Department of Commerce (NOAA), and the United States Department of the Interior (DOI) (collectively referred to as the Trustees) is entered into in recognition of their common interests and/or responsibilities as designated natural resource trustees, including their coordination and cooperation in the initiation and conduct of natural resource damage assessments, settlement negotiations, development of positions for covenants not to sue or administrative releases from liability, or development and support of claims for litigation for injuries to natural resources resulting from discharges of oil or releases of hazardous substances, and the application of any natural resource damages recovered via any of those mechanisms toward the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources.

II. PARTIES

The following Trustees or their designees are Parties to this MOA and act on behalf of the public as Trustees for natural resources under this MOA:

1. The Executive Director of the Texas Natural Resource Conservation Commission,
2. The Executive Director of the Texas Parks and Wildlife Department,
3. The Commissioner of the Texas General Land Office,
4. The Director, Office of Ocean Resource Conservation and Assessment, National Oceanic and Atmospheric Administration, acting on behalf of the Secretary of Commerce, and
5. The Secretary of the Department of the Interior.

Notwithstanding any other provision of this MOA, the participation of any natural resource trustee who is not a party to the MOA and who has a natural resource interest that is affected by a discharge of oil or release of a hazardous substance shall not be precluded from participating in the natural resource damage assessment process by this MOA. Such other trustees may include, but are not limited to Tribal governments, other Federal agencies, foreign countries, local governments, or affected trustee agencies from other States, which may be added by addendum to this MOA, as necessary, provided that statutory authority exists designating such other parties as Trustees.

III. LOCATION

This MOA addresses natural resources within the boundaries of the State of Texas that are held in trust by both the Federal and State Trustees which are injured as a result of discharges of oil as defined by the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (“FWPCA”), the Oil Pollution Act of 1990, 22 U.S.C. § 2701 et seq. (“OPA”), the Texas Oil Spill Prevention and Response Act, Chapter 40, TEX. NAT. RES. CODE ANN. (“OSPRA”), the Texas Water Code, or the Texas Natural Resources Code, or releases of hazardous substances as defined by the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9601 (“CERCLA”), or the authorities already listed above, including surface and ground waters of the State out to the three marine league line (10.2 miles), the seaward boundary of the State, or injuries that may occur from discharges or releases in waters seaward of the State’s boundary with the potential of migrating landward of the State’s seaward boundary.

IV. PURPOSE

The Trustees recognize the importance of integrating and coordinating among themselves and with the lead response, removal, remedial, or corrective action agencies in the reduction of risk to trust resources, and assessment of injuries or the potential threat of injuries to natural resources affected by discharges of oil or releases of hazardous substances including the consequences of removal, remedial, and corrective actions. The Trustees' primary goals are to ensure the restoration of injured natural resources and to seek compensation for interim lost use value caused by discharges of oil or releases of hazardous substances in order to restore, replace, rehabilitate, and/or acquire the equivalent of those affected resources and/or their services. In order to achieve their ultimate goals stated above, the Trustee's activities will primarily involve coordination of all planning, assessments and investigations with the lead response agency, ensuring protection or restoration of injured resources and/or their services as part of the removal, remedial or corrective action, determination of conditions upon which the Trustees may grant a covenant not to sue or other type of judicial or administrative release from liability during consent decree or other negotiations, or otherwise assessing and seeking damages for injuries to natural resources and/or the services they provide. The purpose of this MOA is to provide a framework for such coordination and cooperation among the Trustees, and for the implementation of the activities of the Trustees in furtherance of their natural resource Trustee responsibilities for those natural resources affected by those discharges or releases mentioned above. While this document is designed to eliminate the need for incident-specific MOAs, those additional MOAs may be useful or necessary in some cases.

V. AUTHORITY

The Trustees enter into this MOA in accordance with the legal authorities provided for each Trustee by the National Contingency Plan, 40 C.F.R. Part 300, FWPCA, OPA, CERCLA, the Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11, or the OPA regulations, when promulgated, and any other applicable laws or authorities. The State Trustees enter into this MOA pursuant to their designation by the Governor of Texas under CERCLA, OPA, OSPRA, and the Texas Natural Resource Damage Assessment Regulations, 31 T.A.C. 20, or any other applicable laws or authorities.

VI. TRUSTEE FUNCTIONS

The Trustees or their representatives or designees shall seek to abate, through appropriate response coordination, potential threats, reduce risks, or assess damages for injury to, destruction of, loss of, or loss of use of, natural resources, resulting from unauthorized discharges of oil or releases of hazardous substances, including recovering response costs and the reasonable costs of assessing the damages. The measure of damages shall be the cost of restoring, replacing, rehabilitating, or acquiring the equivalent of the injured natural resources and/or services, plus interim lost use or diminution in value pending recovery, assessment costs, and Trustee administrative oversight and procedural costs associated with planning and administering or implementing the restoration of those natural resources and/or services. The Trustees recognize the Congressional and legislative intent that restoration is the preferred alternative wherever possible and practicable.

Consistent with their individual authorities and policies, the Trustees or their representatives or designees may employ one of several types of actions, depending on the circumstances of each discharge or release, in order to carry out their responsibility to minimize or eliminate risk, or to seek restoration and compensation. Such Trustee actions may include, but are not limited to:

- A. Performing preliminary assessments to determine the potential threat or the nature and extent of threats to natural resources;
- B. Preventing injury, destruction, or loss through requests for initiation of removal or remedial actions by authorized agencies, or by seeking such injunctive relief where authorized by law;
- C. Performing emergency restoration actions and seeking cost recovery for those actions;
- D. Minimizing residual natural resource injuries by participating in removal, remedial, or corrective actions as advisors to the lead response agency, and seeking restoration and compensation for any past or residual injury at remedial or corrective action sites;
- E. Negotiating a judicial covenant not to sue for natural resource damages for incidents covered by CERCLA, where appropriate, through the U.S. Department of Justice and the Office of the Texas Attorney General;
- F. Performing natural resource damage assessments;

- G. Negotiating administrative or judicial agreements for resource protection measures, restoration, and/or compensation for natural resource damages;
- H. Referring claims for natural resource damages for litigation; and/or
- I. Preparing and implementing restoration plans.

VII. RESTORATION AND COMPENSATION GOAL

The goal of restoration or compensation projects is to assure that no net loss of natural resources or their services occurs. Prior to the consideration of restoration alternatives, the Trustees will strive to have any continuing releases that would impede natural recovery or limit the effectiveness of restoration activities controlled. In addition, the restoration of chemical and physical quality of the environment to baseline or no effects levels will be sought. Methods to accelerate the rate of return of injured habitats or ecosystems to baseline levels of services will be used whenever possible. Key species should be restored to baseline levels and lost services should be replaced as directly as possible. Consistent with the guidelines above, the following hierarchy will be considered when the Trustees evaluate restoration or compensation project options: 1) on-site and in-kind—natural resources or services are restored at the site of injury and are physically and biologically the same as those lost; 2) off-site and in-kind—natural resources or services are restored at a site different than where injuries occurred but are physically and biologically the same as those lost; and 3) on-site and out-of-kind—natural resources or services are restored at the affected site but are physically and biologically different than those injured. The Trustees understand that circumstances may arise that may require the revision of this hierarchy of preferences. Such revision may include, but is not limited to, the consideration of additional restoration or compensation options that are within the scope of Trustees' authority and this MOA, such as: 1) off-site and out-of-kind—natural resources that are physically and biologically different than those lost are restored on a site different than the one affected but preferably in the same watershed or ecosystem; or 2) acquisition of equivalent natural resources and/or services under private ownership which replaces the lost natural resources or services by reducing future losses by placing acquired resources under public ownership and protection.

VIII. TRUSTEE ORGANIZATION

The Trustees and their representatives recognize the importance of planning and coordinating their efforts in order to effectively and efficiently meet their respective natural resource trustee responsibilities under applicable Federal and State law. The Trustees and/or Trustee representatives, or Trustee Council members (see below), will coordinate their efforts to ensure the following: 1) that notifications of discharges or releases will be relayed to all Trustee agencies according to the National Contingency Plan or Area Contingency Plans; 2) that sites with co-Trustee interests are identified by response agencies, including, but not limited to NPL sites, RCRA facilities, State Superfund sites, instantaneous discharges of oil or releases of hazardous substances, and fish or shellfish closures or advisories due to the discharge of oil or release of hazardous substances; 3) where possible, coordination of written comments to the lead agency On Scene Coordinators or Remedial Project Managers on all lead agency directed scopes of work, work plans, assessments and investigations, including remedial investigations, feasibility studies, and remedial designs; and 4) State and Federal coordination in consent decree, administrative agreement, or other types of negotiations. Notification, as referred to above, shall be made by telephone (with direct contact), or by letter or facsimile to persons designated to receive such information.

For each individual case or incident involving significant participation by two or more State and Federal Trustees, the Trustees agree to create a council (Trustee Council) representing the Trustees (Trustees Council) which will implement this MOA and to which a representative will be designated by each Trustee agency. The Trustees agree to appoint representatives to the Trustee Council who have the level of knowledge and expertise needed to effectively guide the damage assessment and restoration process. Agencies agree to appoint representatives to the Trustee Council who have, at a minimum, the level of authority necessary to make decisions on issues presented to the Council. The Trustees may create Trustee Councils for either a portion of, or the entire damage assessment and restoration processes. For example, the Trustees may create one council to address the damage assessment phase and another to handle the restoration phase. The Trustee Council will designate a Lead Administrative Trustee for individual cases or incidents for administrative purposes. The Trustee Council may seek additional legal or scientific expertise outside its membership when needed. Each Trustee agency will notify Council members when representatives resign and agree to inform other Trustee representatives about who the replacement will be. For individual incidents, the Trustee Council will attempt to name the Lead Administrative Trustee within 24 hours of Trustee notification in order that a Trustee point of contact be established as rapidly as possible. In addition, where appropriate, the Federal Trustees shall designate a lead Federal Trustee for the purposes of accessing the Federal Oil Spill Liability Trust Fund.

IX. TRUSTEE COUNCIL DUTIES AND RESPONSIBILITIES

On behalf of the Trustees, the Trustee Council created to address each incident shall coordinate and authorize (consistent with applicable law, policy, mandated areas of jurisdiction, and areas of special expertise) all Trustee activities and matters under this MOA in accordance with the decision making requirements contained in Section X. The Trustee Council may take whatever actions it determines are appropriate to fulfill the trust responsibilities of the Trustees under and to effectuate the purposes of applicable Federal and State law. It is expected that the Trustee Council may, as appropriate and consistent with each representative's delegated Trustee authority, take any of the following actions, among others, while focusing on to heir individual trust resource responsibilities related to a particular incident:

- A. Conduct or oversee scientific and technical studies, sampling, and other matters related to the determination of injuries and/or the assessment of damages for trust resources which may have been lost, injured or destroyed.
- B. Seek compensation from responsible parties for damages and/or restoration costs and for the costs of planning and implementing the assessment and/or restoration.
- C. Participate in negotiations with responsible parties.
- D. In accordance with applicable law and respective agency policy and delegation of authority, supervise, manage and obligate on behalf of the Trustees any money paid to the Trustees, except for reimbursement of assessment and administrative costs, by or on behalf of responsible parties for the purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources.
- E. Oversee the development, implementation, and appropriate monitoring of a plan for the restoration, replacement, rehabilitation, and/or acquisition of equivalent resources for those trust resources and/or their services that may be injured, destroyed or lost.
- F. In accordance with applicable law, make all necessary decisions on a case by case basis for the management and administration of funds pursuant to Section XI.
- G. In accordance with applicable law, arrange contracts with professional consultants that the Trustee Council determines are necessary.
- H. When necessary, identify a contact for coordination with the Coast Guard regarding access to the Oil Spill Liability Trust Fund.

- I. Communications with potentially responsible parties or their agents: The Trustees and Trustee Council members agree that they will endeavor to have coordinated communications with potentially responsible parties or their agents for an incident on matters related to natural resource damages and claims for those damages. To the maximum extent possible, no Trustee or Trustee Council member will discuss these matters with the potentially responsible parties without first providing the other Trustees or Trustee Council members notice and an opportunity to participate in such discussions as appropriate. The above agreement shall not preclude a Trustee or Trustee Council member from having separate communications with the potentially responsible parties on matters within the scope of the MOA where circumstances warrant, provided that each Trustee or Trustee Council member notifies the other Trustees and agrees to provide documentation of the communication for the Administrative Record.

X. LEAD ADMINISTRATIVE TRUSTEE

The duties of the Lead Administrative Trustee shall include, but are not limited to: coordination and monitoring of the progress of the formulation of technical and legal positions for covenant not to sue, administrative agreement, or other negotiations; coordination and monitoring of the progress of the natural resource damage assessment process; scheduling of meetings of the Trustee Council and notifying Trustee Council members of those meetings on a timely basis; preparing agendas for those meetings; acting as a central contact point for the Trustee Council; establishing and maintaining of records and relevant documents; and other administrative duties as directed by the Trustee Council. The Lead Administrative Trustee will be responsible for informing the other Trustee Council members and all pertinent developments on a timely basis. The Lead Administrative Trustee may delegate any of his/her duties to another Trustee representative with the concurrence of the Council. Assigned duties do not provide the Lead Administrative Trustee with decision making rights beyond those normally held by each Trustee.

XI. DECISIONMAKING

The Trustees will strive for unanimous consent on all decisions by a Trustee Council implementing this MOA. The dissent of one party will not prevent the other parties from proceeding except for the initial selection of the Lead Administrative Trustee, selection of which requires consensus. Matters in dispute by more than one agency may be elevated to the Authorized Officials of the Trustee Agencies for resolution in an expeditious manner. If necessary, the Trustees or their representatives may establish further mechanisms by which disputes may be resolved, including mediation as provided in the NRDA regulations. The Trustees further agree that decision making deliberations will focus upon the Trustees' mutual goals of mitigating injury through cleanup, source control and remediation, and of assessing, restoring, rehabilitating, replacing and/or acquiring the equivalent of the affected natural resources and services.

XII. FUNDS

The Trustees agree to cooperate in good faith to attempt to establish and maintain, to the extent consistent with applicable law, a joint trust account(s) or joint court registry account(s) for purposes of receiving, depositing, holding, disbursing, and expending all funds for the conduct of the damage assessment and restoration process, including all natural resource damage recoveries obtained or received by the Trustees and interest earned thereon. The Trustees agree that they will use all recovered damages for natural resource injuries exclusively for restoration activities consistent with Trustee Council approved Restoration Plans conducted under this MOA to address those injuries to natural resources and the services that they provide. The Trustees agree to request that administrative costs recovered from responsible parties be separately reimbursed to each individual Trustee agency.

Administrative costs, if deposited to the fund, will be disbursed by electronic transfer or by check to the individual agencies as rapidly as possible, and shall be used at the individual agency's discretion. The Trustees agree to deposit any recoveries for injury to natural resources obtained or received by or on behalf of any Trustee as a result of joint damage assessment and restoration activities under Federal and/or State natural resource damage assessment regulations in a joint account(s), unless all Trustees agree that funds recovered from a particular case require different treatment.

The Trustees, in accordance with their decision making process in Section XI, shall establish standards and procedures governing the joint use of all natural resource damages received by the Trustees for the purposes of developing and administering or implementing a Final Restoration Plan for restoring, replacing, rehabilitating and/or acquiring the equivalent of natural resources injured as a result of an incident and the reduced or lost services provided by those resources.

The Trustees further agree that the reasonable costs jointly agreed upon for the initiation of damage assessment and for the planning, conduct, evaluation and coordination of all natural resource damage assessment activities pursued by the Trustee Council with respect to natural resource injuries or lost services resulting from an incident, shall be advanced or reimbursed to each Trustee out of any damage assessment cost recoveries or payments thereon, including funds received from the Oil Spill Liability Trust Fund.

XIII. CONFIDENTIALITY

The Trustees support an open government policy of providing access to scientific information created or obtained by the Trustees during the damage assessment process. The Trustees do hereby agree that any information in the possession of the Trustees shall be confidential if, and only if, such information is obtained or retrained in anticipation of litigation or during pending litigation, provided, however, that all such information is subject to disclosure pursuant to Federal and State rules of evidence and discovery. It is further understood and agreed that information subject to public disclosure upon request and pursuant to the Freedom of Information Act or the Texas Open Records Act shall be released. However, the parties acknowledge and agree that all Federal documents produced in fulfillment of obligations under the MOA that are protected from release under Federal law will be protected from release by State agencies. All Trustees agree to notify other Trustees in writing, of each request for information no more than five (5) days from the date of such request. Trustees will disseminate all relevant documents to each other so that each agency can respond to any request it receives.

XIV. RESERVATION OF RIGHTS

Except for the confidentiality agreement contained in Section XII, all parties understand that this document is not intended to create any further legal rights or obligations among the Trustees or any other persons not a party to this MOA. Nothing in this MOA is to imply that any signatory government is in any way abrogating or ceding any responsibilities or authority inherent in its control or trusteeship over natural resources.

XV. MODIFICATION OF AGREEMENT

Modification of this MOA shall be in writing and upon approval of all Trustees currently parties to the MOA. It is acknowledged that additional agreements may be executed by the Trustees with regard to natural resource damage claims that arise and for planning for the restoration, replacement, rehabilitation, and/or acquisition of equivalent natural resources that may be injured, destroyed or lost. These incident-specific MOAs shall not be considered modifications of this MOA, and will be the subject of the same procedural and substantive requirements contained herein.

XVI. TERMINATION

This MOA shall be in effect from the date of execution until terminated by agreement of the Trustees. At any time the Trustees determine that there is no purpose served by this MOA, the MOA will terminate upon such a finding. Any Trustee agency may withdraw from this MOA at any time for any reason. In the event any Trustee withdraws from the MOA, it must provide thirty days written notice before the withdrawal can become effective. In the event of such withdrawal, this MOA remains in full force and effect for the remaining parties.

In the event of the withdrawal of any Trustee, or at the termination of this MOA, each Trustee agrees to cooperate in preparing a full and complete accounting for and status report of all accounts managed jointly by the Trustees or their representatives pursuant to Section XI of this MOA.

XVII. LIMITATION

Nothing in this MOA shall be construed as obligating the United States, the State or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

XVIII. THIRD PARTY CHALLENGES OR APPEALS

The rights and responsibilities contained in this MOA are subject to the availability of funding and are intended to be guidance for the respective Trustees. They may not be the basis of any third party challenges or appeals. Nothing in this MOA creates any rights or causes of action in persons not parties to this agreement.

XIX. EXECUTION: EFFECTIVE DATE

This MOA may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOA. The date of execution shall be the date of the final Trustee's signature.

D.3 General Framework for a Draft Agreement among Trustees and RPs

STATEMENT OF COMMITTEE REGARDING MODEL MEMORANDUM OF AGREEMENT

The attached Memorandum of Agreement (MOA) is intended to provide a model for Trustee/Responsible Party cooperative natural resource damage assessment action in the event of an oil spill. The model was developed by an ad hoc committee convened in Houston, Texas which was composed of representatives of state and Federal trustees, industry and protection & indemnity club correspondents. A list of those participating in the process is included.

In developing the MOA, the committee decided to create a general framework in order to promote cooperation among the parties. The heart of the document is the requirement that all assessment work, whether under the aegis of the MOA or not, will be subject to data sharing requirements. This puts the process squarely in the public domain.

The MOA has been designed so that parties may enter into the agreement immediately after a spill, before any pre-assessment or assessment work has been done. When executed at this early stage, the MOA is chiefly a statement of cooperative intent and embodies direction and guidance for proceeding with the NRDA process. The committee feels that it is important for this statement of cooperative intent to be formalized early on.

The MOA is of general application and has evolved from cooperative assessments conducted in Texas over the past few years. Although it contains language concerning trustee authority that is applicable to a spill in Texas, other appropriate state authorities can be substituted when the MOA is used elsewhere. The committee hopes that this MOA will receive wide distribution so that trustees and responsible parties will have had a chance to consider it prior to spills and thus be able to enter the cooperative process quickly and with assurance that a proven process is described within its four corners. The committee invites feedback on the document so that updates and improvements can be added and distributed. Correspondence can be directed to Grayson R. Cecil, 1200 Smith Street, Suite 1300, Houston, Texas 77002.

**COMMITTEE
FOR DEVELOPMENT OF
MODEL MEMORANDUM OF AGREEMENT
GOVERNING COOPERATIVE NRDA**

GOVERNMENT REPRESENTATIVES

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Steve Spencer
Allan M. Strand
US Department of the Interior

Ingrid Hansen
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Texas General Land Office

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MODEL AGREEMENT

MEMORANDUM OF AGREEMENT BETWEEN PARTIES GOVERNING COOPERATIVE NRDA AT OIL SPILLS

This Memorandum of Agreement (MOA) is among the [trustees] referred to as "Trustees," and the [Companies], referred to as "Companies." The Parties are hereafter collectively referred to as "the Parties." This MOA shall become effective as of the last date of its execution by the authorized representatives of the parties.

I. INTRODUCTION

On or about _____, 199_, (describe event, location, vessels involved, and date). As a result, a quantity of [name of product] was released into the waters of _____ (hereafter the "Incident"). This MOA is entered in recognition of the common interests of the Parties in determining whether natural resources have been or are likely to be injured as a result of the Incident and in providing a cooperative framework and funding to conduct activities to determine such effects, and in seeking expeditious restoration of affected natural resources.

II. PURPOSE

This MOA provides the terms by which the Parties agree to undertake a joint cooperative assessment of natural resource injuries and strategy for restoration (hereinafter "Assessment"). The National Contingency Plan at § 300.615(d)(2) provides the Parties the opportunity to reach negotiated agreements to obtain Company-financed or Company-conducted assessments. Also, the Texas Oil Spill Prevention and Response Act at § 40.17, the Texas Natural Resource Damage Assessment rules at 31 TAC § 20.23(b), and the OPA Natural Resource Damage Assessment Regulations (15 CFR Part 990) require the Trustees to invite Companies to participate in the Assessment process. The Assessment will include the development of a cost-effective and efficient Assessment plan to be jointly implemented by the Parties. The detailed study plans for this joint endeavor will be described in the Attachment(s). The Parties will seek to resolve issues relating to restoration of natural resources and their services without costly litigation.

III. TRUSTEE AUTHORITY

The Federal Trustees enter into this MOA in accordance with the legal authorities provided to each Federal Trustee by the FWPCA, OPA, CERCLA, Executive Order 12777 (10/22/91), the National Contingency Plan (40 CFR Part 300), the OPA Natural Resource Damage Assessment Regulations (15 CFR Part 990), and any other applicable laws or authorities. The State Trustees enter into this MOA pursuant to their designation by the Governor of Texas under CERCLA, OPA, OSPRA, and the Texas Natural Resource Damage Assessment Regulations, 31 TAC 20, and any other applicable laws or authorities.

IV. ASSESSMENT AND RESTORATION STRATEGY

The Parties are entering a cooperative process to identify a strategy for assessing natural resource injuries resulting from the Incident and for planning their restoration. The study plans for this process will be described in detail in attachments to this MOA and those attachments, when finalized and added, will be fully incorporated into this MOA and subject to all of its terms and conditions. The Parties agree to implement the strategy described in the attachments for the Assessment. The Parties stipulate that the plans for the Assessment described in any attachments to this MOA, both collectively and by individual component, represent appropriate scientific methodologies for determining the nature and extent of natural resource injuries and losses attributable to the Incident and for planning appropriate restoration based thereon. Disputes regarding the execution of the Assessment shall be governed by Paragraph VI.

Should the Parties agree that results of any individual component of the Assessment indicate a need to modify the budget, content, parameters, scope, or methodology of such component, the written modification shall be added as an addendum to the attachment describing the study plan to be modified. If agreement on pursuing such additional work is not reached and one Party wishes to pursue such additional work outside the scope of this MOA, such additional work shall be subject to the requirements of Paragraph VIII regarding individual Assessment studies.

If there is an additional release of oil attributable to the Incident or the extent of injury to trust resources otherwise changes after a study plan is attached to this MOA, the Parties agree to undertake a good faith effort to incorporate the new information into studies subject to this MOA. If agreement is not reached regarding the new information and any Party wishes to conduct additional studies outside the scope of this MOA, the additional studies shall be subject to the requirements of Paragraph VIII regarding individual Assessment studies.

V. PUBLIC PARTICIPATION

In compliance with applicable law, the Trustees will provide public notice and solicit public review and comment during certain phases of the Assessment process, including the assessment planning and/or restoration planning phases, and prior to finalizing any proposed settlement. In the event that the Parties have entered agreements under this MOA that propose activities subject to public notice, review and comment, the Parties agree that none of the activities shall be initiated until the appropriate notice, review, and comment requirements are fulfilled unless there is a scientific or technical necessity for proceeding prior to completion of the public notice and comment period. In cases of scientific or technical necessity, certain studies may go forward before and during the public notice, review, and comment process.

The Parties agree that they will work together and with the On-Scene Coordinator when appropriate to coordinate dissemination of information to the Public and, whenever possible and legally permissible, the Parties will permit joint statements or information releases. To the extent practicable, the Trustees will notify the Companies of any production of documents in response to requests under the Freedom of Information Act and the Texas Public Information Act.

Following completion of a proposed settlement agreement, the Trustees shall make such agreement available for public review and comment for a period of at least thirty (30) days. The Trustees may hold a public meeting to receive comments during the comment period. The parties agree that any such proposed settlement shall not be final until the comment period expires and all comments received have been duly considered and addressed by the Trustees. As required by applicable law, the Trustees shall enter all documentation developed for the Assessment into an Administrative Record to be made available to the public during review of the settlement agreement.

VI. CONDUCT OF THE ASSESSMENT STRATEGY

The Parties agree that all parties to this MOA will be given sufficient notice in advance of scheduling field work or other assessment activities and that all Parties may be present at any and all locations where work that is part of the Assessment described in Paragraph IV herein is being performed. The Parties stipulate that they will fully and freely share all data developed during the studies and, thereafter in accordance with Paragraph VIII, and the Parties' representatives shall have access to and use of all data collected during the period of this MOA. Any disputes rising from the execution of the study plans will be addressed by the Parties' representatives directly responsible for their formulation. Failure to resolve the dispute will end the joint cooperative assessment for that particular study which is the subject of the dispute. Written notice to all Parties is required defining the parameters of the work so excluded from the terms of this MOA.

VII. DISBURSEMENT OF FUNDS

Each attachment will describe a part of the Assessment and will contain a fully described and delineated budget for implementation. This budget will include trustee administrative costs for coordination of the Assessment. The Companies independently covenant to pay the Trustees in immediately available funds within thirty (30) working days the amount provided in the budget for any such attachment. The funds shall be disbursed or deposited in an appropriate manner for the Trustees' use solely to fund the study plans described in attachments hereto. Funds may not be transferred between studies without the written consent of all Parties. The Trustees will provide a full accounting of the expenditure of funds for each study. In addition, the Companies may designate a representative who will monitor spending for studies under this MOA. Funds and any accrued interest remaining at the conclusion of any study will be returned to the Companies. As prohibited by OPA, 33 U.S.C.A. § 2706(d)(3), nothing in this MOA shall be construed as permitting double recovery of funds provided by the Companies under this MOA in any claims arising from the Incident.

VIII. THE PARTIES INDEPENDENT FINDING AND RIGHTS

The Parties will use their best efforts to reach consensus on the interpretation of the data resulting from any study plan described in Paragraph IV and the attachments hereto. The Parties expressly reserve the right to disagree on the interpretation of the data resulting from any study and to produce separate and independent findings and conclusions.

The Parties expressly reserve the right to perform independent Assessment studies outside the scope of this MOA for potential use in the Assessment process. If such independent studies are undertaken by any Party, notice must be given to all Parties before independent studies are initiated. The conduct and implementation of such independent studies shall be in accordance with the data collection and sharing requirements of Paragraph VI of this MOA.

Other studies may also be undertaken by the Parties for purposes outside the scope of the Assessment and this MOA will have no applicability to such studies. The Parties agree that these studies will not be used in the Assessment process or any litigation involving the natural resource damage assessment claim without agreement of all Parties.

IX. RESERVATION OF RIGHTS AND CLAIMS

A. By entering into this MOA, the Parties agree that none of them is making any admission of fact or law. The MOA may be admissible as evidence in an action to enforce the MOA, but execution of the MOA itself, with or without supporting attachments, shall not be admissible as evidence or proof of liability or non-liability. Nothing in this MOA is to be construed to abrogate the right of any Party to pursue claims against or contribution from another Party. Nothing in this MOA is intended or shall be construed as a waiver by the Parties of defenses or affirmative claims in any proceedings relating to the Incident or of any other rights or remedies. Notwithstanding the foregoing language, nothing in this MOA precludes the Parties from agreeing otherwise in an amendment, modification, or attachment to this MOA or in a separate, independent document.

B. The Companies are not released from any potential liability, including but not limited to claims for damage, injury, loss, or destruction of natural resources or their uses, claims for the costs of assessing damage, injury, loss, or destruction of natural resources or their uses, claims for restoration or replacement of natural resources or lost uses of those resources, or any other causes of action or requests for relief, either administratively or judicially, under either state or federal law, as well as any claims, causes of action, or requests for relief in admiralty, arising from the releases described above.

C. The Trustees agree that no funds they receive from the Companies pursuant to this MOA will be used to fund any ongoing or continuing research project without agreement of all Parties.

X. SETTLEMENT NEGOTIATIONS

Upon completion of the Assessment, the Parties will use their best efforts to resolve any outstanding issues necessary for a final settlement. Any such negotiations and documents used in such discussions, whether a settlement is reached or not, shall remain completely confidential between the Parties, unless all Parties consent to release such information or unless the release of such information is required by law or compelled by court order.

XI. GENERAL

This MOA in no way affects or relieves the Companies of their responsibility to comply with any applicable federal, state, or local law, regulation, or permit.

XII. MODIFICATION AND TERMINATION

Any modification of this MOA or its attachment(s) must be in writing and executed by all of the Parties. Any party may terminate this MOA by giving thirty (30) days written notice to all Parties.

In the event that the Companies withdraw from further participation or their participation is terminated by the Trustees pursuant to the NRDA rules at 31 TAC 20.23(f), this MOA will automatically terminate. Notwithstanding any other provisions of this MOA, including Paragraph IX above, all stipulations shall survive the termination of this MOA for any reason.

XIII. NATURAL RESOURCE TRUSTEE AND COMPANY CONTACT PERSONNEL

This MOA establishes that [name agency(s)] will serve as the Lead Administrative Trustee(s) (LAT(s)) for this Incident. Duties of the LAT(S) include, but are not limited to, the following: scheduling of meetings between Parties; acting as the central point of contact for the Parties; maintaining records and documents relating to the damage assessment; and coordinating the preparation, issuance, or arrangement for public notices or reports as determined necessary by the Parties.

Each Trustee agency and the Companies hereby respectively designate the following person as their representative contact regarding this Incident:

[LIST OF CONTACTS]

XIV. EFFECTIVE DATE

This MOA may be executed in one or more counterparts, all of which shall be considered an original. The Effective Date of this MOA shall be the last date of execution of any counterpart hereto.

D.4 Draft Agreement among Trustees and RPs

I. INTRODUCTION

This Agreement is between [_____] (referred to as "trustees") and [_____] (referred to as "responsible party(ies)"). The trustees and responsible party(ies) are hereafter collectively referred to as the "Parties." This Agreement arises from the [_____] ("Incident").

The purpose of this Agreement is to provide the framework for a cooperative injury assessment to facilitate resolution of any natural resource damage claims arising from the Incident and to minimize the transaction costs associated with such claims. For the purposes of the Agreement, "injury assessment" is defined to encompass those activities related to the determination and quantification of injuries resulting from the Incident. Although this Agreement is drafted in terms of the injury assessment, the Parties also intend to explore the potential for continuing cooperative work throughout the development and implementation of a final restoration plan to resolve the natural resource damage claims arising from this Incident.

Signature on the agreement line provided below shall constitute acceptance by the Responsible Party(ies) and the Trustees. {Written concurrence is necessary to permit all Parties to continue the cooperative injury assessments already begun.}¹ The terms and conditions of this Agreement are as follows:

II. COOPERATIVE STUDIES

The Parties will attempt to reach consensus on the necessity of, selection of, design of, and protocols for performing studies relating to the injury assessment for the Incident.

- A. Process.** The Parties may propose studies. Any proposed study that all Parties agree is reasonable and appropriate shall be deemed a "Cooperative Study." The study plan for each Cooperative Study is or will be attached to this Agreement and will be subject to all of its terms and conditions.
- B. Funding.** The Responsible Party(ies) shall fund all Cooperative Studies through to completion unless the Parties agree to the contrary or the study design calls for discontinuation upon the occurrence of a specified event. The parties shall agree on specific procedures for disbursement of funds.

¹ This provision may be used when the Parties have begun cooperative work before the execution of this Agreement.

C. Retention of Persons Performing Cooperative Studies.

1. *Jointly Designated Experts.* In order to promote a cooperative injury assessment, the Parties may jointly agree on the retention of "Jointly Designated Experts" to perform all or part of a Cooperative Study. Prior to the completion of the Injury Assessment, any person designated as a Jointly Designated Expert shall not be retained separately by, and shall not otherwise perform services on behalf of, any Party, with respect to the Incident. The Parties may consult with such persons at scheduled meetings in which all the Parties shall have an opportunity to participate. Neither the Parties nor any persons retained by them shall engage in any *ex parte* communications (other than routine, non-substantive communications) regarding the Incident with Jointly Designated Experts, unless all Parties not party to the communication consent. Any and all contracts for Jointly Designated Experts shall prohibit any such *ex parte* communications. The Parties shall adopt such other reasonable strictures and controls as are appropriate to protect the objectivity and fairness of Jointly Designated Experts.
2. *Separately Retained Experts.* The Parties may separately retain experts relating to the incident. The Parties may elect to conduct one or more Cooperative Studies with the use of Separately Designated Experts. The Trustees may propose the use of their own Separately Retained Experts as part of a proposed Cooperative Study and may propose that the cost of such experts be funded by the Responsible Party(ies) as part of such proposal.

D. Data Collection. All parties may be present during data collection for Cooperative Studies. The parties agree to give advance notice by telecopy to the Study Contact (defined below) of data collection activities for Cooperative Studies. All data collected for Cooperative Studies shall be fully and freely shared among the Parties as soon after it is collected as is reasonably practical, and in any event no later than it is transmitted to any single Party.

E. Interpretation. The Parties will attempt to reach consensus on the interpretation of, and conclusions to be drawn from, data collected during Cooperative Studies. Each Party expressly reserves the right to produce and present separate and independent interpretations and conclusions.

F. Modification of Cooperative Studies. The Parties may agree to modifications of study plans for Cooperative Studies. The Study Contact designated by the Trustees pursuant to Paragraph VIII.B. may agree to modifications on behalf of all of the Trustees.

- G. Withdrawal from Cooperative Studies.** The Responsible Party(ies) shall not withdraw from its obligation to fund a Cooperative Study so long as the study is conducted consistently with the agreed study plan and any agreed modifications thereto.
- H. Use.** Unless advance written consent is provided by all Parties, Cooperative Studies shall be used only as part of this overall cooperative injury assessment, and in an effort to achieve a negotiated settlement of the natural resource damage claims arising from the Incident. The Parties agree that any result in a Cooperative Study that is not challenged by such Party in writing within 30 days of receipt of the final report shall be binding upon such Party in any judicial or administrative proceeding between or among the Parties relating to the natural resource damage claims arising from the Incident. The Parties also agree that the final results of any Cooperative Study, including interpretation, shall be admissible in any judicial or administrative proceeding between or among the Parties relating to the natural resource damages arising from the Incident, regardless of whether any Party has challenged such results. The Parties further agree not to challenge the reasonableness or appropriateness of the study designs or protocols of any Cooperative Study in any such proceeding. The Parties reserve the right to challenge the admissibility of Cooperative Studies in any judicial or administrative proceeding other than one for natural resource damages arising from the Incident.
- I. Subsequent Use of Experts.** Any Party may call a Jointly Designated Expert as a witness in any judicial or administrative proceeding relating to natural resource damages arising from the Incident, to testify regarding the conduct of, and conclusions reached, in performing such study. In addition, any Party may seek to retain, as a testifying or consulting expert, any Jointly Designated Expert, and no Party shall object to the retention or testimony of such person on the basis of such person's prior participation as a Jointly Designated Expert.

III. INDEPENDENT STUDIES

The Parties expressly reserve the right to perform independent injury assessment studies ("Independent Study(ies)").

- A. Notice.** At least ___ days prior to the commencement of any Independent Study conducted by or on behalf of a Party, such Party shall provide detail work plans and protocols for such Independent Study to the other Parties. The Parties shall also provide prompt notice of any changes made to the scope of work of any Independent Study in progress.

- B. Data Collection.** All Parties may be present during data collection for Independent Studies. The Parties agree to as reasonable advance notice as circumstances allow of data collection activities for Independent Studies. All data collected for Independent Studies shall be fully and freely shared among the Parties as soon after it is collected as is reasonably practical, and in any event no later than it is transmitted by the analyst to the Party sponsoring the Independent Study.
- C. Final Reports.** Any Party conducting an Independent Study shall provide copies of any final report relating to such study within 7 days of its completion.
- D. Use.** The Parties agree and stipulate that failure to comply with the requirements of Sections II.A. and II.B. with respect to any Independent Study shall result in a bar to the admissibility and use of any such Independent Study in any judicial or administrative proceeding between or among the Parties for natural resource damages relating to the Incident.

IV. REFUSED STUDIES

The requirements, prohibitions, and limitations and agreements of Sections II.B. through II.D. shall not apply to any study proposed by the Trustees for funding as a Cooperative Study that the Responsible Party(ies) refuses to fund, and that the Trustees undertake at their own expense ("Refused Study").

V. NON-PARTY STUDIES

A "Non-Party Study" is any study that was not conducted directly or indirectly by, on behalf of, or with the input of any of the Parties. Agencies of Federal, State, or tribal Government other than the Trustees are not Parties to this agreement for purposes of this definition. The Parties reserve the right to use Non-Party Studies in any judicial or administrative proceeding, and to object to such use.

VI. DISCLOSURE OF EXPERTS/CONFLICTS OF INTEREST

The Parties agree that they will identify any outside experts that they intend to retain with respect to natural resource injury assessment (for purposes of giving testimony, conducting studies, or otherwise), including Separately Retained Experts as described in Paragraph I.C.2. above, at least 7 days prior to formalizing such retention or, in the case of experts already retained, within 3 days of signing this Agreement. The Parties agree that they will require the disclosure of potentially conflicting relationships by the experts as part of their employment, which disclosed information shall be shared among all Parties, and further agree to require in all contracts for expert services reasonable and appropriate strictures and controls to prevent the transfer of confidential information.

VII. DISPUTE RESOLUTION

The Parties may jointly designate a mediator or special master, with expertise in natural resource damage actions, for assistance in resolving disputes over issues upon which the Parties cannot agree. Such involvement by the designee shall not result in any final or binding decision on any such issue, but rather shall be in the form of mediation assistance to help the Parties reach mutual agreement on such disputed issues. The costs for any such mediator or special master shall be shared equally between the Trustees and the Responsible Party(ies).

VIII. PUBLIC PARTICIPATION

In compliance with applicable law, the Trustees will provide public notice and solicit public review and comment during certain phases of the injury assessment process, including the assessment planning and/or restoration planning phases, and prior to finalizing any proposed settlement. In the event that the Trustees and the Responsible Party(ies) have entered agreements that propose activities subject to public notice, review, and comment, the Parties agree that none of the activities shall be initiated until the appropriate notice, review, and comment requirements are fulfilled unless a time-sensitive or emergency situation exists. In such cases, certain studies may go forward pending the public notice, review, and comment process.

IX. NOTICE

A. General. Except as provided in Paragraph VIII.B. below, Notice under this Agreement shall be given to the following persons on behalf of the Parties:

1. *As to the Responsible Party(ies):*

2. *As to the individual Trustees:*

_____, etc.

B. Study Contacts. The Trustees shall jointly designate a single Study Contact for each Cooperative Study who shall be authorized to act on behalf of all of the Trustees with respect to that particular Cooperative Study.

X. MODIFICATION

This Agreement may be modified or supplemented through appendices upon agreement in writing by all Parties.

This Agreement may be executed in one or more counterparts, all of which shall be considered an original. The Effective Date of this Agreement shall be the latter date of execution of any counterpart hereto.

The Parties to date have acted in good faith, to the Parties' collective benefits, and look forward to continuing to work among themselves under the framework set forth above.

FOR THE RESPONSIBLE PARTY(IES)

Name

Date

FOR THE TRUSTEE(S)

Name

Date